In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-22

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HERTZKA & KNOWLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. Respondent contends that the court of appeals simply "did not * * * find no substantial evidence to support the [Board's] finding that Hertzka had violated Section 8(a)(2)" of the Act (Br. in Opp. 10), and that, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, such an issue is not appropriate for further review. However, *Universal Camera* does not preclude review where the lower court's finding of lack of substantial evidence is predicated on an error of law. See *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378. That is the situation here. As shown in the petition (pp. 13-14), although it agreed with the Board that the Company had violated Section 8(a)(1) of the Act by threatening reprisals if the OAE were not rejected at the December 6 election, the court below failed to consider the significance of that finding on the domination charge

under Section 8(a)(2). Had the court considered the Company's prior 8(a)(1) conduct, it could not properly have upset the Board's finding that the committee system was not the voluntary preference of the employees. For, contrary to respondent's contention (Br. in Opp. 9-10), the cases cited at pp. 14-15 of the petition demonstrate that, where an organization like that here is selected on the heels of employer unfair labor practices directed against an "outside" union, it is reasonable for the Board to conclude that the former could not be the free choice of the employees.

2. There is no substance to respondent's quarrel with the Law Judge's findings, which the Board adopted and the court below did not disturb, that "the committee system was patterned after the SOM committee system and that it was adopted at a meeting called by management" (Br. in Opp. 11). Thus, whether or not the December 7 meeting was requested by an employee, Vice President Hanna did not so state when opening the meeting. Rather, consistent with his announcement of the previous day that he was calling a meeting where management was "going to put its money where its mouth was," he said that management was "seeking a dialogue" so that problems between management and employees could be resolved, and asked for "proposals or suggestions" as to how this could be accomplished (Pet. 5). And, regardless of what was specifically in the mind of the employee who proposed the committee system, that

system was similar in fact to the SOM system which had been suggested before the election as an alternative to the OAE.[1]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,
National Labor Relations Board.

SEPTEMBER 1975.

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[1]Contrary to respondent's implication (Br. in Opp. 11), the Law Judge did not find that employee Smith himself intended to copy the SOM proposal (Pet. App. 44a). His finding is instead based on the objective similarity of the two plans (Pet. App. 48a-49a, 51a) which the court of appeals also recognized (Pet. App. 9a, n. 13). Indeed, the quotation on p. 5 of our petition, to which respondent objects (Br. in Opp. 5), reflects this same recognition on the part of the other employees who voted on the plan. The quotation is from the testimony of employee John Klein who stated: "Then Dennis Smith proposed a committee structure similar to what they have at S.O.M. * * *" (Tr. 109).